

COMMENTS OF REED ELSEVIER INC.

Reed Elsevier Inc. appreciates the opportunity to provide these reply comments in response to the Notice of Inquiry issued by the Copyright Office on November 24, 1999. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 64 Fed. Reg. 66,139 (1999).

About Reed Elsevier Inc.

Reed Elsevier Inc. (REI) is a world-leading publisher and information provider. Through our Elsevier Science products, including scientific and medical journals, books and online services, REI is the world's largest publisher of scientific information. Our legal division includes the LEXIS-NEXIS service, one of the country's earliest and most comprehensive online providers of information for corporate, government and legal markets, as well as extensive educational and professional publishing activities. Finally, REI's business segment includes leading business and trade magazines and information services. Some of the best-known brands within the REI portfolio are *Variety*, *Broadcasting and Cable*, *Shepard's*, *Martindale-Hubbell*, *Michie*, *Matthew Bender*, *The Lancet*, *Marquis Who's Who*, *Publishers Weekly*, and *Books-In-Print*.

REI supports the comments filed in this proceeding by a number of copyright industry organizations and copyright-based companies (the "Joint Comments"), as well as those submitted by Meyer & Klipper, PLLC on behalf of a group of database producers. We fully agree with the conclusions reached by those filings: that the prohibition against acts of circumvention of access control measures set forth in 17 U.S.C. 1201(a)(1)(A) should come into force on October 28, 2000, as scheduled, and that no "particular class of works" should be exempted from this general prohibition. We offer this separate submission to provide more detail on how access control measures used by REI, particularly in the academic and library environments, not only do not

adversely impact, but actually facilitate, licensed access to a staggering array of information products and services, including a host of materials protected by copyright.

Making Information Broadly Available to Students, Faculty and Researchers:
The Role of Access Controls

REI's success in making copyrighted materials available online to American students, faculty and researchers is second to none. Our award-winning LEXIS-NEXIS Academic Universe product, introduced in 1998 to enthusiastic reviews, is the most ubiquitous commercial information service available in the U.S. academic environment. Academic Universe currently features electronic access to the full texts of more than 5,200 periodicals, newspapers and research journals from all over the world. (For a current list of these titles, see <http://cisweb.lexis-nexis.com/marketsource/reports.htm>). Some 5.7 million students at almost 1200 two-and four-year institutions are currently authorized for unlimited access to Academic Universe or one of its related products. This amounts to nearly three-fourths of the entire university enrollment nationwide.

Contrary to the fears expressed by some during the Congressional consideration of the Digital Millennium Copyright Act (DMCA), this uniquely successful product is not offered on a "pay per use" basis. Instead, an unprecedented partnership among REI, individual academic and library institutions, and consortia of university libraries enables the great majority of American university students to enjoy broad access to the vast information resources contained in Academic Universe.

The central element in this partnership is a series of license agreements under which colleges, universities, libraries, and the other institutions represented in the consortia obtain unlimited access to Academic Universe for all their students, staff and researchers on a per-capita fee basis. Because of the economies of scale that the mega-consortia structure makes possible, these fees are extremely low: under the largest agreement, the participants in SOLINET, a consortium of college, university and public libraries throughout the Southeast, pay only \$1.48 per full time equivalent student for

unlimited access throughout the 1999-2000 academic year. Hallett, "Mastering the Expanding LEXIS-NEXIS Academic Universe," *EContent*, October 1999, <http://www.ecmag.net/awards/award4.html> (visited 3/30/00). This fee is a small fraction of the considerable costs that libraries would bear to provide access to the hard copy sources.

In order to offer this unprecedented degree of online access to copyrighted materials to the higher education community across the country, REI must employ access control mechanisms in connection with Academic Universe and similar products. This allows us to ensure that the resource is made available only to students, faculty members, and researchers authorized by the institutions with which the Academic Universe licensing agreements have been concluded. The main mechanism we use is called IP validation. This access control protocol allows access to Academic Universe only through computers with Internet Protocol (IP) addresses supplied in advance by the participating institutions to REI. Thus, institutions may (and often do) validate all computers on their internal networks for access to Academic Universe. Within each institution, a large number of simultaneous users can enjoy unlimited access to all data offered within the service, with no limits regarding connect time, number of searches conducted, or volume of material printed, downloaded, or e-mailed. Licensee institutions may even extend this validation to authorized off-campus users who access Academic Universe via proxy servers operated by the institution.

While the spectrum of eligible students, administrative staff, faculty members, library staff and those who physically walk into the libraries of the participating institutions is extremely broad, it is not infinite. Nor does the low-cost Academic Universe subscription fee entitle users to access all other REI databases, including those compiled and maintained at great expense for use by specialized medical, scientific or other researchers. The IP address validation requirement, as well as password protection for some of the services falling outside the scope of Academic Universe, are essential ingredients for making this extraordinary service possible. Measures that could be taken to "spoof" REI's systems into believing that a query came from a validated IP address, rather than from a hacker or data thief with no connection to a participating academic or

library institution, would undermine the integrity of the Academic Universe licensing regime. If left unchecked, these circumventions of access control mechanisms could undercut the economic viability of the service and require its curtailment or discontinuance, affecting not only REI, but all our customers as well. Such actions should be illegal and should give rise, in appropriate cases, to liability. That is what section 1201(a)(1)(A) would do.

These observations about Academic Universe also apply to a considerable degree to other REI products. We have moved aggressively over the past several years to make our huge range of business, scientific, medical and professional publications and databases available to users in whatever format our customers desire, including, increasingly, online over the Internet. In some cases the additional online access is provided at no additional cost to subscribers. For example, Elsevier Science gives free electronic access to the most recent nine months of virtually all of our science journals to paid print subscribers. These developments have greatly expanded overall access to these materials, especially by students, faculty members and researchers, for a wide range of permitted uses.

This increased availability would not be possible without the use of reliable access control measures – increasingly, IP validation -- designed to restrict access to authorized users. Users who are affiliated with an academic, library or research institution, or with a company or government agency, who use a computer on the institution's network, with an IP address previously validated to REI, may obtain access. Others may not. While, in some limited situations dictated by technical and other constraints, Elsevier Science and other REI entities still operate access control systems based on user name and password, these are generally being abandoned in favor of IP-validation systems, which are easier to administer, more convenient for (and perceived as less intrusive by) end-users, and more reliable in screening out unauthorized accesses. University libraries have supported our IP access security systems, as they also want to protect what they have paid for from unauthorized use by poachers who make no contribution toward paying the bill.

Bringing into force the prohibition against circumvention of these access control measures would undoubtedly accelerate the trend toward greater availability of these copyrighted information resources to the students, researchers and professionals who need them. Delaying the effective date of section 1201(a)(1)(A) would be a setback that would slow down the rapid migration of these resources to the online environment and would limit our flexibility to offer benefits like free access to the most recent nine months of journals mentioned above.

Comments on Submissions

Upon a review of the numerous comments received in the first round of this proceeding, REI finds no support for the proposition that section 1201(a)(1)(A) is likely to have any significant adverse impact on the availability of any of its products for noninfringing uses. Our conclusion on this score is buttressed by the fact that proponents of any delay in bringing this provision into force bear a heavy burden of persuasion regarding the predicted impact of section 1201(a)(1)(A), and by the clear intent of Congress that any predicted adverse impacts which may be found must be balanced against the likelihood that the prohibition will promote the growth of “use-facilitating technological measures.” See House Comm. on the Judiciary, 105th Cong., 2d Sess., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, 6-7 (Comm. Print 1998), *reprinted in* 46 J. Copyright Soc’y U.S.A. 631, 639-40 (1999). In this regard, we believe that the impact of the prohibition will be overwhelmingly positive: an environment of greater security will encourage making even more information resources broadly available online.

Nevertheless, we would like to take this opportunity to respond to several anecdotal observations in some of the submissions, notably the comments offered by the American Library Association and four other library organizations (Comment # 162). We believe that a careful analysis of these concerns will reveal that they are inapplicable, at least to the products and services offered by REI. In several instances, REI has

responded to similar concerns through amendments to its licensing terms, technological modifications, or policy changes. These all exemplify the ability of market participants to respond efficiently to legitimate concerns of licensees of copyrighted materials, a phenomenon recently noted by the Copyright Office in the context of licensing for distance learning applications.

For example, the library commentators express concern about whether copyrighted products will be available for archiving purposes if they are forbidden to circumvent access controls in order to make archival copies. REI's affiliate Elsevier Science has already responded to this concern. We recently announced our commitment to carry out perpetual archiving of back issues of all our scientific journals, and have pledged not to dismantle our archival facility without depositing copies in selected libraries or similar approved archives. We have also offered libraries the opportunity to maintain their own local archives of our material. We are also very actively working with library organizations and national libraries worldwide, including the Library of Congress, to develop new models for publisher-library co-operation to ensure appropriate digital archiving.

Similarly, both the library comments and those submitted by higher education groups (Comment # 161) decry the imposition of access controls on materials to which a user initially obtained lawful access for a time period which has expired (for example, they ask whether a former subscriber may readily obtain access to electronic "back issues" that were published during the subscription term). While REI supports the Joint Comments in which it is noted that Congress ultimately concluded that no special status should be accorded in this proceeding to the interests of such "initial lawful users", Elsevier Science has addressed this issue by incorporating the concept of "permanent electronic rights" in its standard licensing agreements. Subscribers retain access rights indefinitely to the issues of the journal published during the time period during which they subscribed. Elsevier Science even provides ongoing access to back issues of discontinued titles (e.g., those journals that it no longer publishes). The only exception occurs when REI no longer holds the rights to back issues, which can result when the

third party proprietor of a journal published by REI under contract decides to switch publishers.

Some respondents to a survey carried out by the library associations complained about limitations on the number of users who are simultaneously allowed to access copyrighted materials online. In REI's experience, such limitations are usually the result of technological constraints, such as those involving the robustness of the network resources employed to provide access, or the capacity of the institutional network over which the material in question must travel. Certainly with regard to the Academic Universe product, there is little economic incentive for REI to impose such a limitation, since the license under which the service is offered provides for unlimited access by all students enrolled in the participating institution. Whether those students access the service simultaneously or seriatim is basically irrelevant, but for technological constraints. Allowing access control measures to be circumvented to evade these technological limits would do nothing to increase availability, and indeed could stress system resources, with undesirable results.

Finally, the library groups' comments express concerns about the inability of users to access copyrighted resources remotely. As noted above, in the IP address validation environment employed by Academic Universe, Elsevier Science's ScienceDirect and most other REI online products marketed to academic and library institutions, authenticated remote access is permissible when users access the service through a proxy server operated by the institution and previously identified to REI. We are also developing improved authentication methods specifically for the academic market that will allow transmission of encrypted passwords by remote users. This should enable us to allow remote users affiliated with an institution to access our web services from home, on the road, or in other situations in which it is not desirable to be routed through the institution's proxy server.

Of course, this means of increasing the availability of copyrighted resources would be frustrated if individuals were free to employ tools to break the encryption of passwords or otherwise to steal access validations. This is precisely the type of behavior

that section 1201(a)(1)(A) would outlaw. A delay in bringing this essential provision into force would thus set back our efforts to respond to market needs by making our copyrighted products even more readily available to authorized users.

Conclusion

REI appreciates this opportunity to provide its perspectives on the important issues that fall within the scope of this rulemaking. Please do not hesitate to contact us if we can provide further information or clarification about anything in this submission.

Respectfully submitted,

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March 31, 2000